(2)

No. 00-262

IN THE
United States Supreme Court

STATE OF ARKANSAS,

Petitioner,

v.

KENNETH ANDREW SULLIVAN,

Respondent.

ON PETITION OF WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. **Is the decision of the Arkansas Supreme Court, that the absence of probable cause for a motorist's pretextual arrest rather than being cited renders the inventory of his vehicle unreasonable, based on an adequate and independent state ground for the judgment?**

2. **Does a pretextual warrantless arrest for a non-jailable minor traffic offense violate the Fourth Amendment?**

3. **Does a pretextual vehicle inventory violate the Fourth Amendment?**

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BRIEF IN OPPOSITION

The respondent, Kenneth Andrew Sullivan, respectfully requests that this Court deny the petition for writ of certiorari because there are adequate and independent state grounds for the Arkansas Supreme Court's judgment, and thus this case does not implicate this Court's decision in *Whren v. United States*, 517 U.S. 806 (1996). Alternatively, respondent requests that this case be held in abeyance for determination after the impending decision in *Atwater v. City of Lago Vista*, No. 99-1408, argued December 4, 2000, and grant the writ instead on the questions presented by respondent which implicate *Atwater*. Respondent submits that this case falls in between *Atwater* and *Whren*, involving a pretextual arrest for a non-jailable traffic violation, a pretextual demand for documents to facilitate a plain view search, and the pretextual addition of an insupportable misdemeanor charge,

which implicate the reasonableness clause of the Fourth Amendment, an issue not fully addressed in *Whren* and potentially involved in *Atwater*.

RULES INVOLVED

Ark. R. Crim. P. 4.1(a)(iii) on arrest is reproduced in the Appendix at 1-A.

Ark. R. Crim. P. 16.2 on motions to suppress is reproduced in the Appendix at 1-A--2-A.

STATEMENT OF THE CASE

A. Respondent's version of the facts

This case all started because respondent Sullivan was observed by Officer Joe Taylor of the Conway, Arkansas, Police Department allegedly speeding downhill on Skyline Drive (U.S. 65) in Conway on November 18, 1998. Off. Taylor was "assigned to the narcotics section as a drug interdiction officer" whose primary function as a law enforcement officer was to "[f]ind dope." (R. 48) Taylor clocked Sullivan on radar going 40 m.p.h. downhill (R. 39-40) in a 35 m.p.h. zone. Off. Taylor testified that he also could tell from the side of the road that Sullivan's "eyebrow" window tinting was about an inch longer than the five inches allowed under Arkansas law.[1]

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1. Off. Taylor conceded that, upon closer inspection, the window tinting was of a legal size in the windshield's center, but that toward the door posts it was illegal by an inch-and-a-half to an inch-and-a-quarter. (R. 52) The officer's testimony concerning whether he intended to arrest Sullivan for driving a vehicle with an improper window tint is in conflict. *Compare* (R. 42: "I advised him that he was being placed under arrest for carrying a weapon, no insurance, no vehicle registration. His vehicle was unsafe since he could not tell what speed that [sic] he was traveling.") *with* (R. 46: "Speeding, improper tint, no registration, no proof of insurance, and in my opinion his vehicle was unsafe.") No charge of having an illegally tinted window is present in the record. (R. 3-4).

As luck would have it, Sullivan then pulled into a gas station just past where the officer was sitting, got out of his old Ford Bronco, and walked up to the gas pump. (R. 40, 52, 53) The officer pulled in behind him without ever turning on his blue lights. (R. 50) While Sullivan was standing where "the gas nozzle is on the vehicle" (R. 53), the officer told Sullivan that he wanted to see his driver's license. (R. 41, 52) He told Sullivan why he had stopped him, and Sullivan explained that his speedometer cable was broken, and that he had a new one but had not yet been able to replace it. (R. 42) Sullivan was always cooperative (R. 50), and produced his driver's license. Officer Taylor immediately recognized Kenneth Sullivan's name from "narcotics intelligence" that the Conway Police Department had on him. (R. 50-51, 68)

At this point, Taylor asked for Sullivan's vehicle registration and proof of insurance.[2] (R. 41, 52) When Sullivan, a disabled roofer who still worked part time (R. 5, 53-54), opened the truck door to retrieve the other papers (R. 41), Taylor observed a rusting roofing tool that looked like a hatchet under the driver's seat. (R. 41-42, 53) The officer decided that, in addition to charging Sullivan with a speeding violation, he would also arrest him for possession of a weapon,[3] an offense that requires evidence that the alleged

2. Under Arkansas law, proof of registration and insurance is all available to law enforcement in the computer system of the Arkansas Department of Finance and Administration, the state's "DMV." Ark. Code Ann. § 27-22-104(c) (proof of insurance can be checked by officer through computer). Indeed, all Arkansas motorists can renew their vehicle tags online because the State has all the required information on current registration, insurance, and even county tax assessments on computer. <http://www.arstar.ihost.com.>

Off. Taylor radioed in to run Sullivan's information through the computer and got no wants or warrants. (R. 69) If there was information that suggested that the vehicle was not registered or insured, he would have learned it then.

3. Off. Taylor admitted that, had he not seen the roofer's hammer, he would have been required to issue only a citation for the speeding, registration and insurance violations. (R. 62-63) It was only the presence of the "weapon," the possession of which was a Class A misdemeanor, which required that Sullivan be brought to the station in order to be fingerprinted. (R. 63) The Conway Police Department has no policy of which Off. Taylor was aware to assist officers in determining what is and is not a weapon.

weapon be "available for use with a purpose to employ it as a weapon against a person," Ark. Code Ann. § 5-73-120(a). (R. 58) The officer admitted in his testimony, however, that nothing suggested to him Sullivan's intent to use it as a weapon (R. 61),[4] that he never even touched the roofing tool until the inventory started (R. 43), and that he had asked Sullivan for consent to search for other weapons, which was not done until the inventory (and no other "weapons" were found). (R. 55)[5]

Off. Taylor called for assistance to transport Sullivan, and he began an inventory of the vehicle as required by Conway Police Department policy. Although he testified that "this was not an overly curious stop" to him (R. 47), the inventory literally started as expeditiously as humanly possible, before any tow vehicle could have arrived, and even before the assisting officer's car taking Sullivan to jail could pull out into traffic on U.S. 65. (R. 43)[6] The officer admitted that he could not have searched the vehicle but for the

4. The trial judge expressly found that it was *not* a weapon. (R. 82) Defense counsel in the trial court argued that it was a tool of Sullivan's trade. (R. 72)

5. If the officer feared weapons, he had the authority to conduct a protective weapons search of the vehicle without petitioner's consent on reasonable suspicion. *Michigan v. Long*, 463 U.S. 1032, 1049-50 (1983).

There is also somewhat of a conflict in his testimony on this score because, at another point, he testified that he did not request to look inside the vehicle. (R. 47)

6. The speed with which the officer undertook the inventory search is telling. The trial judge did not specifically comment on it, but it would seem that it had some influence on his fact finding of the reason for the arrest.

physical arrest. (R. 63) Off. Taylor found a quantity of methamphetamine and some suspected marijuana in a black bag under the armrest. (*Id.*)

B. The officer's absolute discretion in Arkansas to convert a citable stop for a non-jailable traffic offense into full custodial arrest.

The officer testified that he essentially had absolute discretion to subject any motorist stopped for any traffic offense to a custodial arrest on his whim:

> Q. What factors, if any, do you take into consideration when you make a stop of whether you're going to issue a citation or make a physical arrest?
>
> A. There are several; how busy the day has been, what the productivity has been like, if I have written several citations or if I haven't, attitude of the individual I've stopped, and what laws have been broken here.
>
> . . .
>
> If you're implying as to if there's a quota, no. . . . If I'd been basically working for five hours or four hours and haven't done anything there at all, been what some folks might–would characterize as being lazy, not doing anything, it's–I like to go out and work.
>
> So if Mr. Sullivan had been the first or the second or forth [*sic*] individual that I had stopped that day, I'm basically fixing to end up the day with some activity right there. If I had stopped someone else before him right there, and they had this very same thing, then they may have been the one to have gone to jail there.
>
> [. . .]
>
> Q. . . . I'm talking about the difference between issuing a citation and a physical arrest.
>
> A. If I stop someone for speeding or anything, that's something I can let go with a citation. (bracketed material added) (R. 57-58)

He further testified that Conway Police Officers are to issue citations for all misdemeanors as a matter of Departmental policy, but that for class A misdemeanors, the offender has to be fingerprinted and processed before being cited. (R. 62-63) So, the physical arrest naturally evolves into an inventory (R. 63) even though the offender will shortly be released on a citation and could shortly return and retrieve his vehicle, which the officers in Conway, Arkansas do not permit.

C. The trial court's holding and the Arkansas Supreme Court's affirmance

The trial judge suppressed the search finding it unreasonable. The trial judge found that, while the "stop" was lawful, because it was based upon probable cause from the radar reading, the officer's decision to arrest rather than cite Sullivan because of the drug intelligence information was problematic. The trial judge found that the arrest was made only because the officer had determined to charge Sullivan with possession of the weapon, an offense for which he held there was simply no probable cause:

> He testified that once he got him stopped, he recognized him as someone that he had seen intelligence on regarding narcotics, and he– rather than write citations, he physically arrested him. And then the weapons charge, I think, was just added to that. And I don't believe that in this particular instance that the– that that was appropriate, and I'm going to grant the defendant's motion to suppress the evidence seized as a result of the search. (R. 81)

The State then specifically sought and was refused a ruling by the trial judge that the roofing tool at issue could constitute a "weapon" under Ark. Code Ann. § 5-73-120(a),[7] although he admitted it had a blade such that in theory it qualified as a "knife."

> MR. CLARK: Okay. . . . [W]ould the Court make a finding that that does meet the definition of a knife pursuant to the statute? Is there any question in the Court's mind about that?

---

7. Ark. Code Ann. § 5-73-120(a-b) provide:

> (a) A person commits the offense of carrying a weapon if he possesses a handgun, knife, or club on or about his person, in a vehicle occupied by him, or otherwise readily available for use with a purpose to employ it as a weapon against a person.
>
> (b) As used in this section, unless the context otherwise requires:
>
> . . . .
>
> (2) "Knife" means any bladed hand instrument that is capable of inflicting serious physical injury or death by cutting or stabbing. It includes a dirk, sword or spear in a cane, razor, ice pick, and a throwing star, switchblade, and butterfly knife[.]

THE COURT: That it meets the definition of a knife?

MR. CLARK: Yes, being a bladed weapon capable of–or a hand instrument–any bladed hand instrument that is capable of inflicting serious physical injury or death by cutting.

THE COURT: Under the circumstances of this case, I don't think I can find that that's a weapon. (R. 81-82).

All the findings of fact on the search and pretext were found not to be clearly erroneous by the Arkansas Supreme Court. *State v. Sullivan*, 340 Ark. 315, 318, 11 S.W.3d 526, 528 (not against the preponderance of the evidence), *reh. den.*, 340 Ark. 318-A, 16 S.W.3d 551 (2000). The Arkansas Supreme Court also held that it would not sanction using the traffic laws to search any vehicle the officers wanted. *Id.*:

> The question then becomes whether appellee would have been *arrested* simply for traveling forty miles per hour in a thirty-five mile-per-hour zone and possessing a roofing hatchet that had clearly been in his vehicle for quite a long time, given that it was corroding into the carpet. We find that to be doubtful. His vehicle may have been impounded due to his failure to provide proof of insurance and registration. However, appellee was never *charged* with having no proof of insurance or vehicle registration. Further, the trial court, when assessing the credibility of Officer Taylor (the sole witness at the hearing), the totality of the circumstances, and the applicable law, agreed with appellee that the search and seizure was pretextual and should be suppressed. Clearly, a review of the applicable law illustrates that the issue of pretext necessarily turns on the facts in a given case, and given our standard of review in these cases, we cannot say that the trial court's ruling was against the preponderance of the evidence.

D. How *Whren v. United States* came into the case on rehearing

The tortured path of this case to this Court and the State's Question Presented on application of *Whren v. United States*, 517 U.S. 806 (1996), to these facts by the Arkansas Supreme Court is underscored by the fact that nobody bothered to cite *Whren* in this case until the petition for rehearing in the Arkansas Supreme Court. Respondent's counsel

never cited it (or even tried to explain it away), and with apparent justification since prior Arkansas cases on pretext at least allowed his argument. The State did not cite it in its Response to the Motion to Suppress (R. 27), its argument to the trial court, or its brief in the Arkansas Supreme Court (Appt's Brief, CR99-1140, filed Nov. 18, 1999). In short, everyone was content to rely on Arkansas cases until the Arkansas Supreme Court ruled.

After the State lost in the Arkansas Supreme Court, it complained that the Court had committed a "a significant error of law" by not applying a case no one had bothered to cite to it. (Pet. for Rehearing, filed Feb. 17, 2000 at 1-2). The Arkansas Supreme Court mentioned this oversight. *State v. Sullivan*, 340 Ark. 318-A, 16 S.W.3d 551 (2000) (supplemental opinion on rehearing) ("The State presents us with the *Whren* case for the first time on rehearing and argues that, under *Whren*, a police officer may arrest someone for a minor traffic violation, knowing full well that the real reason for the arrest is to enable a search of the vehicle for a suspected crime.") & *id.* at 318-D, 16 S.W.3d at 553 (dissenting opinion) ("It is true that our opinion did not discuss *Whren*, but only because that case was neither cited nor argued to this court.")

In the original unanimous opinion handed down February 10, 2000, the Arkansas Supreme Court affirmed the trial court's finding that the search was unreasonable because the arrest was pretextual. 340 Ark. at 318, 11 S.W.3d at 528 (quoted *supra*). On rehearing, the Arkansas Supreme Court divided 4-3 on application of *Whren*, but the majority still granted great deference (as it should) to the trial judge's findings. 340 Ark. at 318-C, 16 S.W.3d at 552-53:

Here, the trial court found that the arrest was pretextual and made for the purpose of searching Sullivan's vehicle for evidence of a crime. Again, we do not believe that *Whren* disallows this. Moreover, even if we were to interpret *Whren* to give full rein to law enforcement to effect pretextual arrests for traffic violations, there is nothing that prevents this court from interpreting the U.S. Constitution more broadly than the United States Supreme Court, which has the effect of providing more rights. We arguably have done so with our Criminal Rules that provide more stringent requirements for nighttime searches than Court decisions. See Ark. R. Crim. P. 13.2(c); *Garner v. State*, 307 Ark. 353, 820 S.W.2d 446 (1991).

In sum, we will not give carte blanche approval for all pretextual arrests for traffic violations, as the State would have us do. We draw a clear distinction between arresting a person with crack cocaine in his hands as was the case in *Whren* and effecting a pretextual arrest for purposes of a search, such as we have in the instant case. Surely that flies in the face of reasonableness, which is the essence of the Fourth Amendment. *See State v. Holmes, supra.* We will decide the reasonableness of the arrest and search on a case-by-case basis, as the Whren decision makes clear. For these reasons, we deny the State's petition for rehearing. (footnoted added)

Thus, the Arkansas Supreme Court upheld the trial court's finding that officers of the State did not have complete discretion to arrest a motorist rather than cite the motorist for a traffic offense just so the officer could conduct a search of the vehicle; to rule otherwise, the court reasoned, would be make the search unreasonable under the Fourth Amendment.

The three dissenting justices found *Whren* controlling and added that a custodial arrest was valid for any traffic offense under Ark. R. Crim. P. 4.1(a)(iii) "which states that 'a law enforcement officer may arrest a person without a warrant if the officer has reasonable cause to believe that such a person has committed . . . *any* violation of law in the officer's presence.' (Emphasis added.)" 340 Ark. at 318-F, 16 S.W.3d at 554 (dissenting opinion).

REASONS FOR DENYING THE WRIT

I. The Decision of the Arkansas Supreme Court, However Inartfully Stated, Is Based on Adequate and Independent State Grounds in Interpreting State Law; Certiorari Should Thus Not Be Granted.

The Arkansas Supreme Court's opinion on rehearing cited *Arkansas law* for the proposition that it could provide greater protections for a criminal defendant than are afforded under the federal constitution. 340 Ark. at 318-C, 16 S.W.3d at 552-53 ("*See* Ark. R. Crim. P. 13.2(c); *Garner v. State*, 307 Ark. 353, 820 S.W.2d 446 (1991)"). Ark. R. Crim P. 13.2(c) affords Arkansas citizens greater protections from nighttime searches than does the Fourth Amendment, a point which *Garner v. State* made clear. Indeed, in *Garner*, the Arkansas Supreme Court had expressly declined to apply the good faith exception of *United States v. Leon*, 468 U.S. 897 (1984), to a nighttime search warrant issued without a factual basis: "Our concern today is for the integrity of our Rules." *Garner v. State*, 307 Ark. 353, 359, 820 S.W.2d 446, 450 (1991) (emphasis supplied).

But *Garner* was not the first nighttime search case in which the Arkansas Supreme Court had construed Arkansas Rules of Criminal Procedure to provide citizens greater protections from improperly authorized nighttime searches than does the Fourth Amendment. In fact, it had done so consistently, having rejected in 1980 the argument that it should follow any federal standard.[8] By relying on *Garner*, the Arkansas Supreme Court's

8. Arkansas has consistently held its nighttime search rule to be so fundamental that a substantial violation of the rule cannot be saved by the good faith exception under *Leon*. *See, e.g.*,

opinion on rehearing in this case thus referenced a *state* rule of criminal procedure, and a *state* law decision, which itself had emphatically rejected applying a federal constitutional standard, and which reflected an independent *state* constitutional standard that was two decades old. Reliance on *Garner* is all that is required.

That the issue was presented as a matter of state law at the hearing and in the original briefs in the Arkansas Supreme Court and on rehearing is hardly surprising; both parties and the trial court had always analyzed it as such. Respondent in the trial court grounded his motion to suppress on the Arkansas Constitution,[9] the federal constitution, and the Arkansas Rules of Criminal Procedure. (R. 19) He cited exclusively *state* cases (one of which referenced a 1932 U.S. Supreme Court opinion[10]), for the proposition that

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Fouse v. State, 337 Ark. 13, 21-23, 989 S.W.2d 146, 150-51 (1999) (quoting *Garner*, 307 Ark. at 358-59, 820 S.W.2d at 449-50, and the reference to "our Rules, but also by our state and federal constitutions."); *Langley v. State*, 66 Ark. App. 311, 314, 990 S.W.2d 575, 577 (1999); *Richardson v. State*, 314 Ark. 512, 519, 863 S.W.2d 572, 576 (1993); *Thompson v. State*, 42 Ark. App. 254, 259, 856 S.W.2d 319, 321 (1993); *Carpenter v. State*, 36 Ark. App. 211, 214, 821 S.W.2d 51, 53 (1991); *State v. Martinez*, 306 Ark. 353, 356-57, 811 S.W.2d 319, 321 (1991); *Hall v. State*, 302 Ark. 341, 344, 789 S.W.2d 456, 458-59 (1990).

In fact, the Arkansas Supreme Court first held that the violation of its nighttime search rule was "substantial" for state exclusionary rule purposes four years *before Leon* was decided in *State v. Broadway*, 269 Ark. 215, 217-18, 599 S.W.2d 721, 723 (1980). In *Broadway*, the Arkansas Supreme Court held that evidence would be suppressed if the search violated the Fourth Amendment, the Arkansas Constitution, art. 2, § 15, or Ark. R. Crim. P. 16.2 (requiring suppression only if the violation was "substantial"). *Broadway*, 269 Ark. at 217-18, 599 S.W.2d at 723. The Arkansas Supreme Court explicitly rejected the State's reliance on federal cases on that point. *Id.* at 217, 599 S.W.2d at 723. Chief Justice Fogleman dissented on the ground that the court should start with the Fourth Amendment in construing Rule 16.2; *id.* at 218-19, 599 S.W.2d at 724; something the majority expressly declined to do.

9. The motion cited generally Ark. Const., art. 2, but the search and seizure provision is art. 2, § 15.

10. *United States v. Lefkowitz*, 285 U.S. 452 (1932).

there was "no reasonable basis to believe that the roofing hammer/hatchet was to be used as a weapon." (R. 23) The State's four sentence response in the trial court cited the *state* Constitution, the *state* rules of criminal procedure, and a single *state* case, as well as the "Constitution of the United States of American [*sic*]." (R.27) On appeal, respondent cited exclusively *state* cases, three rules of *state* criminal procedure, and the Arkansas and federal constitutions in his brief in the Arkansas Supreme Court. (Appee's brief, No. CR99-1140, at 14-15). The State cited *state* law, *state* rules of criminal procedure, and a single *state* case in its brief. It simply defies credulity to suggest that a case injected only after two courts had ruled against the State, after argument and briefing of the matter *twice*, somehow was the basis for the decision of the Arkansas Supreme Court.

The Arkansas Supreme Court simply held that it could consider, in assessing the absence of probable cause for an arrest, the fact that the arrest was pretextual. Nothing in *United States v. Whren* precludes this. Moreover, it is also indisputable that the *Arkansas* Supreme Court is free to interpret the *Arkansas* Constitution and the *Arkansas* Rules of Criminal Procedure as more protective of an individual's rights than is the federal constitution, and is the obvious intended point in the opinion's paragraph which specifically references a well-established principle of *state law* and *state* rules of criminal procedure:

> Here, the trial court found that the arrest was pretextual and made for the purpose of searching Sullivan's vehicle for evidence of a crime. Again, we do not believe that *Whren* disallows this. Moreover, even if we were to interpret *Whren* to give full rein to law enforcement to effect pretextual arrests for traffic violations, there is nothing that prevents this court from interpreting the U.S. Constitution more broadly than the United States Supreme Court, which has the effect of providing more rights. We arguably have done so with our Criminal Rules that provide more

stringent requirements for nighttime searches than Court decisions.[11]

340 Ark. at 318-C, 16 S.W.3d at 552. The proposition that this Court's interpretation of the federal constitution is binding upon the courts of the several states hardly merits a grant of certiorari. Respondent would submit that it is not only generally known, but that it is also known to the Arkansas Supreme Court.

The mere fact the Arkansas Supreme Court cites *Garner* shows that its decision was grounded on Ark. R. Crim. P. 16.2 and not the Fourth Amendment.

II. As Decided by the Arkansas Supreme Court, this Case Does Not Implicate *United States v. Whren*, and Thus Certiorari Should Not Be Granted.

The Arkansas Supreme Court rested its opinion on rehearing on the ground that *Whren* did not preclude a pretextual arrest being found unreasonable because it lacked probable cause. In *Whren*, the Court unanimously "foreclose[d] any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved." *Whren*, 517 U.S. at 812. The stop in this case, however, was never alleged to be pretextual. The determination that there was probable cause to charge a roofer with possession of a weapon (to wit, a roofer's hammer, a normal tool of respondent's trade) was found to be legally unsupportable and factually pretextual on the rather simple record in this case.

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11. Perhaps the Arkansas court misspoke and said "U.S. Constitution" and not the "Arkansas Constitution." Nevertheless, the reference to *Garner v. State* should eliminate any ambiguity.

That *Whren* forecloses inquiry into the subjective motivations of the arresting officer as a facial basis for suppression does not mean that it forecloses inquiry into whether the arresting officer had probable cause for his actions. In fact, in *Whren*, this Court distinguished cases in which searches had proceeded without probable cause as ones in which subjective motivations were appropriate constitutional considerations. *See Whren*, 517 U.S. at 818 (citing *Delaware v. Prouse*, 440 U.S. 648 (1979) (random traffic stops), *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (checkpoint stops), and *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (roving patrol stops) as all distinguishable "because they involved seizures without probable cause").

Similarly, this Court just held that the *Whren* limitation on subjective intent did not foreclose inquiry into "programmatic purposes [which] may be relevant to the validity of Fourth Amendment intrusions undertaken pursuant to a general scheme without individualized suspicion." *City of Indianapolis v. Edmunds*, 531 U.S. __, __ (slip op. at 13), 2000 WL 1740936, 2000 U.S. Lexis 8084 (No. 99-1080; Nov. 28, 2000). Here, there is a strong inference that the trial judge was concerned with Off. Taylor's being assigned to a Drug Interdiction Unit with the primary purpose of "find[ing] dope." Hence, he found *as a fact* that the custodial arrest pretextual for a drug search. Under *Whren*, it would seem on the surface that an individual officer's actions are not "programmatic." However, in this case, the officer has the programmatic ability, sanctioned by Ark. R. Crim. P. 4.1(a)(iii), as he testified, to make a custodial arrest in any traffic stop that he conducts, *completely on his individual whim*. That is a scary thought.

Even if this Court were to conclude that *Whren* was somehow implicated by the Arkansas Supreme Court's consideration of the pretextual nature of the charge in determining probable cause, *Whren* is factually different than this case, as the Arkansas Supreme Court recognized in distinguishing it. In *Whren*, the officer approached the car after the traffic stop and observed drugs in plain view in the occupant's lap. In this case, the officer engaged in a pretextual arrest to conduct an inventory which produced the drugs. 340 Ark. at 318-C, 16 S.W.3d at 552-53. There has to be a constitutional difference between the two, and this case gives the Court the chance to articulate it.

The closest parallel case to this one is *State v. Varnado*, 582 N.W.2d 886 (Minn. 1998), where the Minnesota Supreme Court distinguished *Whren* and held that a pretextual traffic stop upon entering "a parking lot of an apartment complex known for drug trafficking" (*id.* at 888) for a cracked windshield led to the driver being frisked before being placed in the police car was unreasonable because the officers had no reason to believe that weapons or contraband would be found. *Id.* at 892. The Minnesota court had previously held that a pretextual inventory violated the Fourth Amendment in *State v. Holmes*, 569 N.S.2d 181, 188 (Minn. 1997) ("the [*Whren*] Court noted it would not uphold as valid police attempts to use the objective basis for an inventory search as a pretext for a purely investigatory search."). (In neither of these cases did the State of Minnesota seek review in this Court.)

The Washington Supreme Court has rejected *Whren* under its State Constitution. *State v. Ladson*, 138 Wash. 2d 343, 357-58, 979 P.2d 833, 842 (1999). The Washington

Supreme Court further noted that it would not permit its citizens to sacrifice their rights simply upon entering a car; 138 Wash. 2d at 358 n. 10, 979 P.2d at 842 n. 10:

> We note if we were to depart from our holdings and allow pretextual traffic stops, Washington citizens would lose their privacy every time they enter their automobiles. The traffic code is sufficiently extensive in its regulation that "[w]hether it be for failing to signal while changing lanes, driving with a headlight out, or not giving 'full time and attention' to the operation of the vehicle, virtually the entire driving population is in violation of some regulation as soon as they get in their cars, or shortly thereafter." Peter Shakow, *Let He Who Never Has Turned Without Signaling Cast the First Stone: An Analysis of Whren v. United States*, 24 Am. J. Crim. L. 627, 633 (1997) (footnote omitted). Thus, nearly every citizen would be subject to a *Terry* stop simply because he or she is in his or her car. But we have repeatedly affirmed that Washingtonians retain their privacy while in the automobile and we will do so today. *See City of Seattle v. Mesiani*, 110 Wash.2d 454, 456-57, 755 P.2d 775 (1988) ("From the earliest days of the automobile in this state, this court has acknowledged the privacy interest of individuals and objects in automobiles.") (citing *State v. Gibbons*, 118 Wash. 171, 187, 203 P. 390 (1922)).

See also People v. Dickson, 180 Misc.2d 113, 117-18, 690 N.Y.S.2d 390, 393 (N.Y. County 1998) (holding traffic stop pretextual and noting *Whren;* until New York Court of Appeals applies *Whren*, existing state law on the intent of the officers must be followed; "the *Whren* Court did not view its pronouncement as constituting a new federal standard"; New York likely will not follow it).

This case reached a similar conclusion, and the judgment of the Arkansas Supreme Court is entitled to constitutional deference.

III. Summary Reversal Is Unwarranted Because of the Nature of the Issues; Instead, If the Court Grants Certiorari at All, it Should Include the Issues Presented by Respondent.

As stated in his Statement of the Case, *supra*, at 1-2, respondent submits that this case falls in between *Whren v. United States* and *Atwater v. City of Lago Vista*. Summary reversal is, therefore, completely unwarranted.

Indeed, if the Court chooses to grant certiorari, it should include the Questions Presented by respondent as well because they are all "fairly included" within the issues presented by the State of Arkansas's certiorari petition, and they are reasons to defend the judgment of the Arkansas Supreme Court. S.Ct. Rule 14.1(a) & 15.2(b); *Robinette v. Ohio*, 419 U.S. 33, 38 (1996) (citing *Vance v. Terrazas*, 444 U.S. 252, 248-59 n. 5 (1980)).

REASONS FOR GRANTING THE WRIT

I. A Pretextual, Warrantless Arrest for a Non-Jailable Traffic Violation Violates the Fourth Amendment, So Certiorari Should Be Granted and this Case Decided in Light of *Atwater v. City of Lago Vista*.

Before Officer Taylor made the pretextual demand of Sullivan for proof of insurance and registration, he had probable cause to charge him with speeding five miles an hour over the limit, even though it is universally recognized that motorists are given a five to ten mile per hour tolerance.[12] Speeding five miles an hour over the speed limit, in Arkansas, is an

12. U.S. Dept. of Transportation, National Maximum Speed Limit–Fiscal Year 1993: Travel Speeds, Enforcement Efforts, and Speed-Related Highway Safety Statistics table 1 (Oct. 1995); H.R. Rep. No,. 171(I), 102d Cong., 1st Sess. 32 (1991), reprinted in 1992 U.S.C.C. & A.N. 1526, 1558 ("the average motorist expects a 5 to 10 mile per hour tolerance by law enforcement personnel").

Both were cited in the petitioners' briefs in *Atwater v. City of Lago Vista*, No. 99-1408,

unspecified "violation," under Ark. Code Ann. § 27-51-201,[13] and as such is punishable by at most a fine of $100.[14] If a physical arrest could be made for this violation alone, then Sullivan could have been removed from his vehicle at this point, and it could have been inventoried, making any subsequent unconstitutional search moot. Noting that such a practice would convey extraordinary discretion to officers in the field, the majority of the Arkansas Supreme Court on rehearing ruled that this result would "fly in the face of reasonableness, which is the essence of the Fourth Amendment. *See* State v. *Holmes*, supra." 340 Ark. at 318-C, 16 S.W.3d at 553.

Nevertheless, the three dissenting justices on the Arkansas Supreme Court not only found *Whren* controlling, but also found that a custodial arrest was valid for *any traffic offense* under Ark. R. Crim. P. 4.1(a)(iii) "which states that 'a law enforcement officer may

Petitioner's Brief at 20-21 (Sept. 11, 2000), and *Whren v. United States*, No. 95-5841, Petitioner's Brief (Feb. 16, 1996).

13. Ark. Code Ann. § 27-51-201(a)(1) provides: "No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing."

14. Ark. Code Ann. § 27-50-301 provides: "Any moving traffic law violation not enumerated in § 27-50-302 shall be known as a violation as defined in Arkansas Criminal Code, §§ 5-1-105 and 5-1-108, and shall be punishable as provided under § 5-4-201." None of the offenses respondent were stopped for are listed in § 27-50-302, so they are punishable by fine only.

Section 5-4-201 lists only fines as punishments, and "violations," unlike felonies and misdemeanors, are not subject to any possible incarceration. *See* Ark. Code Ann. § 5-1-108, defining violations:

> (a) An offense is a violation if it is so designated by this code or by a statute not a part of this code.
>
> (b) Regardless of any designation appearing in the statute defining an offense, an offense is a violation for purposes of this code if the statute defining the offense provides that no sentence other than a fine, or fine or forfeiture, or civil penalty is authorized upon conviction.

arrest a person without a warrant if the officer has reasonable cause to believe that such a person has committed . . . *any* violation of law in the officer's presence.' (Emphasis added.)"[15] 340 Ark. at 318-F, 16 S.W.3d at 554 (dissenting opinion).

This statement in the dissenting opinion is essentially the issue before his Court in *Atwater v. City of Lago Vista,* No. 99-1408, *supra.* The State disclaims any reliance on *Atwater* because respondent did not rely on the Rule 4.1(a)(iii) issue below. (Pet. Cert. at 3-4, n. 1)

Since, however, the dissent discussed Rule 4.1(a)(iii) and said it was binding and supported this arrest, then the majority below must have rejected that interpretation on reasonableness grounds. Therefore, respondent submits that the constitutionality of Rule 4.1(a)(iii) must be fairly included within the Questions Presented and respondent will assert that it is unconstitutional when applied to *any* traffic offense, the issue in *Atwater v. City of Lago Vista, supra,* since the petitioner relies on Rule 4.1(a)(iii) and *Whren.*

The State simply cannot have it both ways. Either the Arkansas Supreme Court impliedly held that Rule 4.1(a)(iii), if interpreted to permit a full custodial arrest for a minor traffic offense, would be unreasonable and thus would violate the Fourth Amendment, or it held that Arkansas' own constitutional reasonableness requirement invalidated the arrest and consequent inventory under Rule 16.2. The first alternative brings this case squarely within the issue presented by *Atwater*–indeed in a way an even more egregious version of the problem presented by *Atwater*–since this was a *pretextual* arrest, rather than

15. The full text of Ark. R. Crim. P. 4.1 is reproduced in the Appendix at 1-A.

a citation for a minor traffic offense, made just so the officer could look for drugs. The second alternative, as respondent has argued, presents an adequate and independent, albeit inartfully expressed, state ground for the judgment, and is thus a proper basis to deny the State's petition for certiorari.

A. Granting Unbridled Discretion to a Law Enforcement Officer to Make a Custodial Arrest to Facilitate an Inventory Search is Unreasonable under the Fourth Amendment.

This Court has always been leery of granting law enforcement officers unbridled discretion. And, granted, much discretion is necessary for them to do their jobs. But, what happens when absolute discretion collides with the "right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures"? This Court usually comes down on the side of restraining discretion to protect the people. Here, that discretion was used to effect an arrest to make a search of respondent's car.

1. The officer's suppression hearing testimony as to his discretion

At the suppression hearing, the officer testified that he had the discretion to arrest whomever he wanted for any traffic offense. (R. 57-58, 62-63) The State agrees, and it cites Ark. R. Crim. P. 4.1(a)(iii) in support of this conclusion (Pet. Cert., at 3, n. 1), as did the dissenters in the Arkansas Supreme Court below. 340 Ark. at 318-F, 16 S.W.3d at 554 (dissenting opinion).

2. The Fourth Amendment's reasonableness inquiry

The first clause of the Fourth Amendment protects us against "unreasonable searches and seizures." Reasonableness is the "fundamental inquiry" in Fourth Amendment

cases. *See, e.g., Cady v. Dombrowski,* 413 U.S. 433, 439 (1973); *United States v. Chadwick,* 433 U.S. 1, 9 (1977); *Griffin v. Wisconsin,* 483 U.S. 868, 873 (1987). It has also been called the "touchstone" of the Fourth Amendment. *Robinette v. Ohio,* 519 U.S. 33, 39 (1996) (quoting *Florida v. Jimeno,* 500 U.S. 248, 250 (1991) (citing *Katz v. United States,* 389 U.S. 347, 360 (1967)) (reasonableness is "contextual and not subject to bright-line rules")); *Whren,* 517 U.S. at 813.

One aspect of the reasonableness is the necessity of checking or limiting the discretion of government officers in the field.

3. This Court's distrust of unbridled discretion in law enforcement officers

This Court has always shown that it is leery of granting unbridled discretion in a law enforcement officer to conduct seizures and then searches, no matter what the context.

In *Delaware v. Prouse,* 440 U.S. 648, 660 (1979), this Court held that random vehicle seizure for driver's license checks was unreasonable under the Fourth Amendment. The Court held that stops, *i.e.*, seizures of the vehicle and driver, could not be based on "the unbridled discretion of law enforcement officials." There has to be limits on the exercise of this discretion. *Id.:*

> When there is not probable cause to believe that a driver is violating any one of the multitude of applicable traffic and equipment regulations–or other articulable basis amounting to reasonable suspicion that the driver is unlicensed or his vehicle unregistered–we cannot conceive of any legitimate basis upon which a patrolman could decide that stopping a particular driver for a spot check would be more productive than stopping any other driver. This kind of standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent. *Almeida-Sanchez v. United States,* 413 U.S. 266, 270 (1973); *Camara*

v. Municipal Court, 387 U.S., at 532-533.

This Court just reaffirmed this language in *City of Indianapolis v. Edmond, supra,* slip op. at 6, where it quoted from the last part of the above quote from *Prouse* that "The officer's conduct in that case was unconstitutional primarily on account of his exercise of 'standardless and unconstrained discretion.' 440 U.S. at 661."

Likewise, in *Mincey v. Arizona,* 437 U.S. 385, 394-95 (1978), a police officer shooting case where the State of Arizona argued for a murder scene exception to the warrant requirement, this Court held that the lower court's limits on the officer's discretion to conduct a murder scene search did not go far enough: "The confer unbridled discretion upon the individual officer to interpret such terms as 'reasonable . . . search' . . . ." The Court held that those limits did nothing to protect against arbitrary searches and seizures, and those judgments had to be made by a neutral and detached magistrate." *Id.* at 395.

Even in the area of administrative searches, this Court has been concerned with grants of unbridled discretion of inspectors to enter property; *Marshall v. Barlow's Inc.,* 436 U.S. 307, 323 (1978) (quoted in *Donovan v. Dewey,* 452 U.S. 594, 599 (1980), and followed in *New York v. Burger,* 482 U.S. 691, 703 (1987)); or order urine tests. *Skinner v. Railway Labor Executives' Assn.,* 489 U.S. 602, 622 (1989) (regulations provided limits on discretion and protected against abuse of discretion).

In *United States v. Brignoni-Ponce,* 422 U.S. 873, 882-83 (1975), the Court also mentioned the "unlimited interference with the use of the highways" that roving patrol stops created, and it followed in *United States v. Martinez-Fuerte,* 428 U.S. 543, 559

(1976), stating that *Brignoni* was based on fears that "[t]here was also a grave danger that such unreviewable discretion would be abused by some officers in the field."

"[S]tandardless and unconstrained discretion" is exactly what this case involves, and the grant of this discretion by Rule 4.1(a)(iii) and the unbridled exercise of this discretion to conduct a pretextual arrest when a citation should do makes all the constitutional difference.

This finding of pretext shows that this stop, arrest, and inventory search was "in the end to advance 'the general interest in crime control.' *Prouse*, 440 U.S., at 659 n. 18. . . . We cannot sanction stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime." *City of Indianapolis v. Edmund, supra,* slip op. at 11.

B. *Whren, Atwater,* and absolute discretion.

Whren v. United States does not deal with officer's discretion. Indeed, the entire premise of the *Whren* is that there was an objectively reasonable basis for a *stop* that lead to a *plain view* of drugs in the hands of the occupants of the car when he walked up. *Atwater* does deal with officer's discretion: his discretion to make a custodial arrest for any traffic offense he chooses. Here, we have an objectively reasonable basis for the stop, but we have absolute discretion as to whether the respondent or any other citizen would be subjected to a custodial arrest rather than a citation. In addition, the officer knew that the custodial arrest permitted an inventory of the vehicle. (R. 63)

Thus, this case falls between *Whren* and *Atwater,* and it is not controlled by either.

Summary reversal on *Whren*, as the State requests, is improper.

C. Thus, Ark. R. Crim. P. 4.1(a)(iii) violates the Fourth Amendment.

Ark. R. Crim. P. 4.1(a)(iii) grants law enforcement officers unbridled discretion to subject *any* motorist to a custodial arrest for *any* traffic offense. Respondent contends that this unbridled discretion in a law enforcement officer violates reasonableness requirement of the Fourth Amendment.

While the State disclaims any relevance of this issue to this case (Pet. Cert. at 3 n. 1), the facts remain that the State raised Rule 4.1(a)(iii) in support of its position below (Appt's Brief, No. CR99-1140, at 4), and the dissenters in the Arkansas Supreme Court relied upon it in concluding that rehearing should be granted. (340 Ark. at 318-F, 16 S.W.3d at 554 (dissenting opinion)). Respondent submits, however, that the constitutionality of Rule 4.1(a)(iii) is before the Court as "fairly included" within the Petition because it may be used to defend the result below.

II. The Court Has Previously Recognized in Dicta That a Vehicle Inventory May Be Pretextual, and, If Certiorari Is Granted, the Court Should Hold Pretextual Inventories Unreasonable.

A. The Court Has Repeatedly Suggested That a Vehicle Inventory Done Merely as a Pretext to Generally Investigate Crime Might Violate the Fourth Amendment.

In *Colorado v. Bertine,* 479 U.S. 367 (1987), the Court dealt with a vehicle inventory after a DWI arrest. The Court stressed that "there was no showing that the police, who were following standardized procedures, acted in bad faith of for the sole purpose of

investigation." *Id.* at 372. At the end of the majority opinion, the Court concluded that "[t]here was no showing that the police chose to impound Bertine's van in order to investigate suspected criminal activity." *Id.* at 376.

Similarly, in the inventory case of *Florida v. Wells*, 495 U.S. 1, 4 (1995), the Court stressed that the requirement of standardized procedures

> is based on the principle that an inventory search must not be a ruse for a general rummaging in order to discovery incriminating evidence. . . . The individual police officer must not be allowed so much latitude that inventory searches are turned into a "purposeful and general means of discovering evidence of crime." *Bertine*, supra, at 376 (BLACKMUN, J., concurring).

In the administrative search case of *New York v. Burger*, *supra*, the Court sustained the search there because the regulatory scheme protected against unchecked discretion. The Court added one caveat, however, *id.* at 726 n. 27, "There is, furthermore, no reason to believe that the instant inspection was actually a 'pretext' for obtaining evidence of respondent's violation of the penal laws. It is undisputed that the inspection was made solely pursuant to the administrative scheme."

Here, we have a finding of fact already sustained by the Arkansas Supreme Court that brings the inventory of respondent's vehicle squarely within the questions reserved in *Bertine* and *Wells*. This is an important question, and it happens every day in this country. Certiorari should thus be granted to resolve this important Fourth Amendment question.

B. The Trial Court's Finding of Fact That the Arrest Occurred to Facilitate the Inventory Is Entitled to Deference on Appeal and Certiorari.

The trial court found as a fact that the custodial arrest and search was pretextual, and the Arkansas Supreme Court affirmed that finding in its original opinion. 340 Ark. 315,

318, 11 S.W.3d 526, 528 (2000). The decision on rehearing changed nothing on this score. The finding of the trial judge, who has presumably seen this officer testify before, is entitled to great weight. "[W]e hasten to point out that a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." *Ornelas v. United States*, 517 U.S. 690, 699 (1996) (decided two weeks before *Whren*).

The trial court found the search unreasonable because the arrest was unreasonable to facilitate an inventory, and the Arkansas Supreme Court said that was not against the preponderance of the evidence. 340 Ark. at 318, 11 S.W.3d at 528.

The facts as found by the trial court align this case more closely with *Atwater* than *Whren*. The officer used his discretion to make a pretextual custodial arrest. If respondent had only been cited by this drug interdiction officer, the officer would not have been able to conduct a search incident. *Knowles v. Iowa*, 525 U.S. 113 (1998). With a custodial arrest, however, the entire passenger compartment could have been searched under *New York v. Belton*, 453 U.S. 454 (1981), or the officer could tow the vehicle and inventory it under the Conway Police Department's inventory policy, *Florida v. Wells*, *supra*, rather than just pull it aside on the convenience store lot, even though respondent would have been released on a citation in short order after fingerprinting.[16]

Here, that is exactly what happened.

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16. Respondent recognizes that this Court has said that the "the existence of alternative 'less intrusive measures'" is not required in the reasonableness inquiry; *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983); *Bertine*, 479 U.S. at 375-76; but it should still weigh heavily when pretext has already been found by the trial court and the appellate court below.

CONCLUSION

The Arkansas Supreme Court decided that probable cause for the misdemeanor weapons charge was not made out in this case, in part because it concluded–as had the trial court–that this charge had been added merely as a pretext to inventory the vehicle. It made this determination based upon an application to the facts of state law, expressed in its state rules of criminal procedure and a state court decision. This is a wholly adequate and utterly independent state law ground for the decision, notwithstanding the State's effort to shoehorn into the matter a federal constitutional case at the eleventh hour.

Moreover, there is a significant factual difference between the facts of this case and *Whren*, and the highest court of another state is in accord with Arkansas on similar facts. Therefore, certiorari should be denied.

If certiorari is granted, it should be to determine whether the facts of this case require a different result under *Atwater* or because the vehicle inventory in this case was pretextual under *Bertine* and *Wells*.

Respectfully submitted,

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APPENDIX

Arkansas Rules of Criminal Procedure Relied Upon

RULE 4.1. Authority to Arrest Without Warrant.

(a) A law enforcement officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed

(i) a felony;

(ii) a traffic offense involving:

(A) death or physical injury to a person; or

(B) damage to property; or

(C) driving a vehicle while under the influence of any intoxicating liquor or drug;

(iii) any violation of law in the officer's presence;

(iv) acts which constitute a crime under the laws of this state and which constitute domestic abuse as defined by law against a family or household member and which occurred within four (4) hours preceding the arrest.

(b) A private person may make an arrest where he has reasonable grounds for believing that the person arrested has committed a felony.

(c) An arrest shall not be deemed to have been made on insufficient cause hereunder solely on the ground that the officer or private citizen is unable to determine the particular offense which may have been committed.

(d) A warrantless arrest by an officer not personally possessed of information sufficient to constitute reasonable cause is valid where the arresting officer is instructed to make the arrest by a police agency which collectively possesses knowledge sufficient to constitute reasonable cause.

RULE 16.2. Motions to Suppress Evidence.

(a) Objection to the use of any evidence, on the grounds that it was illegally obtained, shall be made by a motion to suppress evidence. The phrase "objection to the use of any evidence, on the grounds that it was illegally obtained," shall include but is not limited to evidence which:

1. Consists of tangible property obtained by means of an unlawful search and seizure; or

2. Consists of a record of potential testimony reciting or describing declarations or conversations overheard or recorded by means of eavesdropping; or

3. Consists of a record or potential testimony reciting or describing a confession or admission of a defendant involuntarily made; or

4. Was obtained as a result of other evidence obtained in a manner described in subdivisions one, two, and three; or

5. Consists of the prospective in-court identification of the defendant based on an unlawful pre-trial confrontation.

The motion shall be made to the court which is to conduct the trial at which such evidence may be offered in evidence.

(b) The motion to suppress shall be timely filed but not later than ten (10) days before the date set for the trial of the case, except that the court for good cause shown may entertain a motion to suppress at a later time.

(c) Renewal of a motion to suppress which has been denied may be allowed on the ground of newly discovered evidence or as the interests of justice require.

(d) An order granting a motion to suppress prior to trial shall be reviewable on appeal pursuant to Rule 36.10.

(e) Determination. A motion to suppress evidence shall be granted only if the court finds that the violation upon which it is based was substantial, or if otherwise required by the Constitution of the United States or of this state. In determining whether a violation is substantial the court shall consider all the circumstances, including:

(i) the importance of the particular interest violated;

(ii) the extent of deviation from lawful conduct;

(iii) the extent to which the violation was willful;

(iv) the extent to which privacy was invaded;

(v) the extent to which exclusion will tend to prevent violations of these rules;

(vi) whether, but for the violation, such evidence would have been discovered; and

(vii) the extent to which the violation prejudiced moving party's ability to support his motion, or to defend himself in the proceedings in which such evidence is sought to be offered in evidence against him.